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RAILROAD WAR BONDS. — In "An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes,"[1] approved by the President, March 21, 1918, there are two passages relating to the issue of railroad securities.

"Section 7. That for the purpose of providing funds requisite for maturing obligations or for other legal and proper expenditures, or for reorganizing railroads in receivership, carriers may, during the period of Federal control, issue such bonds, notes, equipment trust certificates, stock and other forms of securities, secured or unsecured by mortgage, as the President may first approve as consistent with the public interest. . . ."

"Section 15. That nothing in this Act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds."

It will be noted at once that section 15 mentions only "stocks and bonds," and says nothing about "notes, equipment trust certificates . . . and other forms of securities, secured or unsecured by mortgage" mentioned in section 7.

Although section 15 purports to be only a construction clause, obviously no cautious lawyer could afford to approve a note or equipment trust certificate with the same freedom he would a certificate of stock or a bond, in view of the fact that the framers of the statute enumerated

[1] C. 107, Sixty-fifth Congress.

only stocks and bonds in section 15, after having made a much longer list in section 7. The statute might conceivably be construed to mean that the power of the states over the issue of notes or equipment trust certificates remains as before the passage of the act. Indeed it is a fair question whether the provision contained in section 7 that carriers may issue securities approved by the President is a grant or a limitation of power.[2] It is provided further in section 7 that securities so approved may be bought by the President. Obviously that would add nothing to their validity.

The only safe position to take in the matter is that whereas before the act the carriers had to comply with the laws of the various states in issuing their securities, now the carriers must also secure the approval of the President as well. The carriers have one more place to go, one more hurdle to leap in the dismal race over conflicting statutes and more conflicting orders of autonomous railroad commissions to the money lender — a way sometimes beset with spoilers whose regard for the Commerce Clause of the Constitution does not prevent them from levying heavy tribute.[3]

If the other interpretation be taken, that section 7 is a new grant of power, part of the supreme law of the land, and exclusive of the action of the state commissions, the going is still very bad. There is first the difficulty that the carriers have only state charters and that it is *ultra vires* for them to issue securities not authorized by the state law. The corporate capacity is lacking. Can it be said that section 7 is an amendment to all state charters of carriers? It is very doubtful that Congress so intended. We might well ask for stronger language to accomplish so revolutionary a purpose. This would be federal incorporation by piecemeal. Many lawyers think that federal incorporation must be voluntary, and accepted by the stockholders concerned, to be constitutional. Not even Congress can force upon them obligations to which they never consented, without depriving them of their property without due process of law. The question involved is similar to that of the limits of the power of the legislature to alter the charter of a corporation, where power to amend has been reserved by the act of incorporation. Thus it is said that the object of the grant or any property rights vested under it may not be defeated or substantially impaired, and that the fundamental character of the corporation may not be changed.[4]

Assuming, however, that the difficulty of the lack of corporate capacity has been safely met, there is still the difficulty in the case of railroad bonds of securing them by lien upon the property. Under the laws of

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[2] In this connection, compare section 5 of the same act, which reads as follows:

"SEC. 5. That no carrier while under Federal control shall, without the prior approval of the President, declare or pay any dividend in excess of its regular rate of dividends during the three years ended June thirtieth, nineteen hundred and seventeen: *Provided, however*, That such carriers as have paid no regular dividends or no dividends during said period may, with the prior approval of the President, pay dividends at such rate as the President may determine."

[3] See Union Pacific R. R. Co. *v.* Public Service Commission of Missouri, 248 U. S. 67 (1918).

Illinois has been even a worse offender than Missouri in this respect, and has extorted enormous sums from interstate carriers for the privilege of borrowing money.

[4] Authorities collected in 12 CORP. JUR. 1027, § 654.

many states, a lien upon a railroad can be created only in a certain way, an order of the Railroad Commission being a part of the process. Suppose the President has approved the issue of a railroad bond, how does this make it a lien on the railroad, contrary to the law of the state where the railroad is situated? Assume, if you please, that Congress can create liens upon railroads — no great concession since federal courts constantly do so in creating receiver's certificates — the present statute has done nothing of the kind. The bond is valid, let us say, as a promise to pay, but is it secured by a lien?

Other delightful features of current state statutes, such as those declaring railroad certificates, notes, etc., not issued by the authority of the State Railroad Commission null and void, and punishing by fine or imprisonment those who issue them, need not be dwelt upon. In a statement of Mr. S. T. Bledsoe, General Counsel of the Atchison, Topeka and Santa Fe Railway Company, read before the Senate Committee on Interstate Commerce, January 20, 1919, will be found collected an extraordinary array of highly conflicting state laws about Railroad Bonds, limiting the power to borrow money as to amount, the rate of interest, the price of bonds, and the purpose for which the money may be used. In Texas, where the tribunes of the people have been very watchful, as a practical matter bonds cannot be issued until the railroad is built, but even this provision has not been completely successful in protecting the state against additional lines of railroad, a few having been financed on property in other states. Unless Congress is prepared to regulate the issue of railroad securities in a very much more thoroughgoing way than by the statute under consideration, they would better let it alone. Even the cleverest draftsman cannot frame a statute which will deal with this subject in an adequate way without the aid of lawyers expert from long experience in passing upon railroad securities. What a pity that the admirable qualities which enable a man to get an office are sometimes not the same as those which qualify him to administer it to the greatest public benefit! Until they are the same, there are cases where a legislator can consult an expert to advantage. This is one.

BLEWETT LEE.

JUDGMENT ON THE EVIDENCE NOTWITHSTANDING THE VERDICT. — If at the trial the defendant makes a motion for a compulsory nonsuit, or if either party moves for a directed verdict in his favor, and on the evidence or lack of evidence, the court should have granted the motion but did not, and a verdict is rendered against the party making the motion, the verdict should not and would not be allowed to stand. In England at common law on motion made to the court in *banc*, a new trial would be ordered. Until 1854 the decision of the court in *banc* was final; but by the Common Law Procedure Act [1] of that year an appeal was permitted, and the appellate court could order a new trial. In this country likewise a new trial may be ordered by the trial court (usually the single judge who presides at the trial), or by the appellate court.[2] It would

[1] § 35. A motion for a new trial is now made in the Court of Appeal. R. S. C., Order 39, Rule 1.

[2] See 31 HARV. L. REV. 682.